Nos. 08-289 and 08-294

IN THE

Supreme Court of the United States

THOMAS C. HORNE, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF ARIZONA,
Petitioner,

and

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES AND PRESIDENT OF THE ARIZONA SENATE,
Petitioners,

v.

MIRIAM FLORES, INDIVIDUALLY AND AS PARENT OF MIRIAM FLORES, MINOR CHILD; ROSA RZESLAWSKI, INDIVIDUALLY AND AS PARENT OF MARIO RZESLAWSKI, MINOR CHILD; STATE OF ARIZONA; AND MEMBERS OF THE ARIZONA STATE BOARD OF EDUCATION IN THEIR OFFICIAL CAPACITIES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS MIRIAM FLORES AND ROSA RZESLAWSKI

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in concluding that no significant change in fact or law justified dissolving its orders requiring the State to determine the costs of an appropriate program for English Language Learner (ELL) students and to provide funding that was not arbitrary in relation to those costs.

2. Whether the court of appeals applied the correct standard in reviewing the district court's denial of petitioners' Rule 60(b)(5) motion.

3. Whether a state testing and accountability plan that is approved by the Secretary of Education as a condition for funding under the No Child Left Behind statute automatically satisfies the requirement under the Equal Educational Opportunities Act of 1974 (EEOA), 20 U.S.C. § 1703(f), to "take appropriate action" to overcome language barriers that impede participation in instructional programs.

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STATEMENT

A. Statutory Background

1. The Equal Educational Opportunities Act of 1974 (EEOA), Pub. L. No. 93-380, title II, 88 Stat. 515 (1974), provides that "[n]o State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin" by "the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." 20 U.S.C. § 1703(f). The EEOA provides individuals with an express private right of action and authorizes courts to grant "such relief, as may be appropriate" for failures to take appropriate action. *See id.* § 1706. The EEOA parallels a regulation issued under Title VI of the Civil Rights Act of 1964 that requires states to take affirmative steps to overcome the language barriers faced by English Language Learner (ELL) students so that they may enjoy equal educational opportunity. *See* 45 C.F.R. § 80.3(b)(1). This Court upheld the validity of that regulation in *Lau v. Nichols*, 414 U.S. 563 (1974).

The leading case interpreting the EEOA's "appropriate action" requirement for ELL programs is *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981). The Fifth Circuit held that "appropriate action" consists of three elements. First, the school system must select a sound educational theory. *Id.* at 1009. Second, it must "follow through with practices, resources and personnel necessary to transform the theory into reality." *Id.* at 1010. Third, the programs must "produce results indicating that the language barriers confronting students are actually be-

ing overcome." *Id.* The *Castaneda* framework has been universally embraced by federal courts that have construed the EEOA and by the federal agencies responsible for enforcing the EEOA and Title VI.[1]

2. The EEOA and Title VI have long existed alongside statutes providing federal funding to states for ELL programs. Since 1965, the Elementary and Secondary Education Act (ESEA), Pub. L. No. 89-10, 79 Stat. 27 (1965), has provided funding for programs aimed at low-income students. In 1978, Congress amended the ESEA by adding Title VII, the Bilingual Education Act, Pub. L. No. 95-561, 92 Stat. 2143 (1978), which provides federal grants for ELL programs.

In 2002, Congress enacted the No Child Left Behind Act (NCLB), Pub. L. No. 107-110, 115 Stat. 1425, 1980 (2002), as an amendment to the ESEA. Title I continues to provide funds for disadvantaged students and high-poverty schools and contains conditions related to educational testing for all students. Title III replaced the Bilingual Education Act and

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[1] *See, e.g.*, *Gomez v. Ill. State Bd. of Educ.*, 811 F.2d 1030, 1041-42 (7th Cir. 1987); *Teresa P. v. Berkeley Unified Sch. Dist.*, 724 F. Supp. 698, 713 (N.D. Cal. 1989); U.S. Dep't of Justice, Civil Rights Division, Discrimination Against English Language Learner Students, *available at* http://www.usdoj.gov/crt/edo/ellpage.php (school's failure "to provide resources to implement its language acquisition program effectively" may violate EEOA); U.S. Dep't of Education, Title VI Language Minority Compliance Procedures (issued Dec. 3, 1985; reissued Apr. 6, 1990), *available at* http://www.ed.gov/print/about/offices/list/ocr/docs/lau1990_and_1985.html (adopting *Castaneda* framework).

significantly revised and expanded federal grant programs for ELL students. *Id.* §§ 301, 1011. No state is obligated to accept federal funds under NCLB. *See, e.g.*, 20 U.S.C. § 6311(a)(1). Once a state voluntarily accepts funds, however, it becomes subject to NCLB's conditions. *See, e.g., id.* § 7844. Title III also contains a "supplement, not supplant" provision barring use of federal funds to supplant other funds that would have been expended on ELL programs. *Id.* § 6825(g). Violation of the "supplement, not supplant" requirement exposes a state to the loss of all federal education funds. *See id.* §§ 1234a-1234i.

To receive federal funds under Title III of NCLB, a state must submit a plan to the U.S. Department of Education outlining how it will set achievement standards and hold local districts accountable for fulfilling them. 20 U.S.C. § 6823(b). Title III requires participating states to test whether ELL students at different grade levels make adequate yearly progress (AYP) in achievement tests, *id.* § 6311(b), and to take corrective measures with respect to schools that fail to make AYP, such as withdrawal of funds or replacing staff, *id.* § 6842(b). The Department of Education has approved the plans of all 50 states and the District of Columbia. *See* U.S. Dep't of Education, President Bush, Secretary Paige Celebrate Approval of Every State Accountability Plan Under No Child Left Behind (June 10, 2003), *available at* http://www.ed.gov/news/pressreleases/2003/.

NCLB did not amend or replace the EEOA. Instead, Congress enacted a savings clause prescribing that "[n]othing in [NCLB] shall be construed in a

manner inconsistent with any federal law guaranteeing a civil right." 20 U.S.C. § 6847.

B. The 2000 Declaratory Judgment

1. In 1992, parents and students at Nogales Unified School District (respondents), a district in southwestern Arizona along the Mexican border, brought this action against the State of Arizona, members of the state board of education, and the state superintendent of public instruction (the Superintendent), alleging violations of the EEOA. J.A. 1-18. Respondents alleged that "Defendants have allowed a number of districts, including [Nogales], to forego or substantially neglect identification, testing, placement, instruction, assessment and reclassification of [ELL] students as federal law requires." *Id.* at 7. They also alleged that "[t]he State has failed to provide financial and other resources necessary for adequate implementation of mandatory [ELL] programs by public school districts in Arizona." *Id.* The district court certified respondents as representatives of a class of present and future "minority 'at risk' and limited English proficient children" in Nogales, as well as their parents and guardians. Pet. App. 7a.[2]

The district court ultimately set several claims for trial. *Flores v. Arizona*, 48 F. Supp. 2d 937, 955 (D. Ariz. 1999). The court stated that its approach would leave state officials free to select ELL instructional programs of their choice, and that it would assess "whether the State's financing scheme is arbi-

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[2] "Pet. App." refers to the appendix to the petition for certiorari in No. 08-294.

trary and bears no relation to actual need." *Id.* at 947. The court emphasized that "federal courts are ill-equipped" to evaluate what specific actions are appropriate, and that it would avoid "substituting its educational values and theories for the educational polices and decisions reserved to state or local school authorities." *Id.* at 948-49. A Consent Order agreed to by the parties before trial (but entered after judgment) resolved certain issues, J.A. 19-40, but did not address funding, number of qualified teachers, class sizes, tutors, teacher aides, instructional materials, or other ELL program attributes.

2. In January 2000, the district court held that the defendants had violated the EEOA and granted respondents a declaratory judgment. Pet. App. 10a. The court concluded that the State satisfied the first prong of *Castaneda* by adopting ELL instructional methods "generally regarded by experts as sound." *Id.* at 148a. It determined, however, that the State had failed to satisfy the second *Castaneda* prong because it did not "follow through" with sufficient "practices, resources, and personnel" to implement its chosen instructional methods. *Id.* at 151a.

The court made a series of findings concerning Arizona's education funding system. The court explained that Arizona "guarantees a minimum level of funding for each student to ensure that each student receives a basic education." Pet. App. 122a. That per-student base funding amount was approximately $3,174.11. *Id.* The State adjusts that funding level for particular classes of students, like ELL students, using a system of incremental "Group B weights." *Id.* at 123a. At the time, the incremental Group B

weight for each ELL student was approximately $150. *Id.* at 125a. The court observed that, although the State provided an additional $150 per ELL student, a cost study performed in 1987-88 showed that districts actually spent $450 per ELL student, and even that study underestimated the costs of an effective program. *Id.* at 123a-124a. Districts like Nogales therefore had no choice but to "increase [ELL] funding by shifting money from non-[ELL] student apportionments." *Id.* at 129a.

The combination of Group B funding and shifting from base funding had proven insufficient to operate an appropriate ELL program. The court found that the State's "inadequate" funding scheme had "resulted in the following [ELL] program deficiencies: 1) too many students in a class room, 2) not enough class rooms, 3) not enough qualified teachers, including teachers to teach ESL and bilingual teachers to teach content area studies, 4) not enough teacher aids, 5) an inadequate tutoring program, and 6) insufficient teaching materials for both ESL classes and content area courses." Pet. App. 149a-150a. The resource constraints were most acute at the middle and high school levels. *Id.* at 133a-138a.

The court found a violation of the EEOA because the State had "failed to follow through with [adequate] practices, resources, and personnel" to implement ELL programs, and because the State's ELL funding was "arbitrary and capricious and bears no relation to the actual funding needed to ensure that [ELL] students in [Nogales] are achieving mastery of its specified 'essential skills.'" Pet. App. 150a-151a. In that regard, the State had advised the court that

it had "taken the first necessary steps" because the "Legislature has ordered the formation of a committee" to study "which bilingual programs work and which do not" and "the amount of money that *needs* to be spent on bilingual programs." Defendants' Trial Mem. (Dkt. #189), at 5 (filed Sept. 17, 1999). The State urged the court to avoid interfering with that process because "the people of the state" had "begun the first steps to address the very issue before [the] Court." *Id.* at 5-6. The court accordingly noted that the State had "ordered another cost study" to "determine the best practices" for ELL programs and "the cost of educating [ELL] students versus what is currently being spent." Pet. App. 125a. The court observed that the study "might well provide a basis for the State to set" ELL funding "which would not be arbitrary and capricious." *Id.* at 150a.

The State did not appeal the district court's judgment. Pet. App. 15a.

C. The Court's Subsequent Orders

1. The State took no action during the 2000 legislative session, and respondents asked the district court to order the defendants to complete a cost study as an initial step toward compliance with the EEOA. Motion for Post-Judgment Relief (Dkt. #203), at 1 (July 13, 2000). The State filed a response "agree[ing] that the actual costs of providing an appropriate, state-wide system of English Acquisition Programs must be ascertained," but requesting additional time to complete the study. Defendants' Resp. (Dkt. #207), at 1, 6 (Aug. 18, 2000).

In October 2000, the district court ordered the State to conduct a cost study "because without judi-

cial action, the federal law violations" would "continue." J.A. 39. The court reiterated that it would "take[] every step to allow state authorities, whose powers are plenary, to decide how to provide [ELL] students with a meaningful [ELL] program." *Id.* The State again did not appeal from that judgment.

2. In November 2000, two ballot initiatives passed by voters had the effect of increasing funding for certain education programs but not ELL programs (Proposition 301), and adopting "sheltered English immersion" as the statewide method for ELL education (Proposition 203). Pet. App. 16a. The State nonetheless took no action to adjust ELL funding during the 2001 legislative session. Respondents therefore moved the district court to compel the State to comply with its declaratory judgment by a specific date. J.A. 42.

In June 2001, the court granted respondents' motion. Emphasizing the "backdrop of state inaction" beginning in 1992 and "continuing through the duration of this case," J.A. 41, the court ordered that "the State's minimum base level of funding per [ELL] student shall not be arbitrary and capricious, but shall bear a rational relationship to the actual funding needed to implement language acquisition programs in Arizona's schools so that [ELL] students may achieve mastery of the State's specified 'essential skills,'" *id.* at 44-45. Once again, the State did not appeal.

3. In December 2001, Arizona enacted HB 2010, which increased the Group B weight from $179 to $340 per ELL student. J.A. 48. HB 2010 also established certain statewide funds for teacher training,

compensatory instruction, and monitoring, and ordered a more detailed cost study. *Id.*

In 2002, the district court concluded that HB 2010 failed to satisfy its judgment because it "fails to have any rational relationship to the actual cost of implementing a language acquisition program." J.A. 49. The court found that the State "has never set specific standards for its programs, nor identified the requisite elements, features, or components for such programs and, therefore, has never assessed actual costs for language acquisition programs." *Id.* The court also found the Group B weight grossly inadequate because it matched the amount Nogales actually spent on programs, and those programs were seriously deficient. *Id.*

The State moved for reconsideration, and the court granted the motion, concluding that HB 2010 was appropriate as an "interim" measure. J.A. 54. The court relied on the State's representation that it was moving ahead with the HB 2010 cost study and was not asking the court "to terminate this litigation." *Id.*

4. For more than two years, the State still took no further action to attain compliance with the district court's orders, Pet. App. 18a-19a, and respondents filed another motion for injunctive relief. In January 2005, the court granted respondents' motion. J.A. 386-93. The court noted the cost study contemplated by HB 2010 still had not been completed. *Id.* at 389. In order "to ensure that Plaintiffs receive the relief they were found to be entitled to more than five years ago while not putting any more requirements on the State than is absolutely neces-

sary," *id.*, the court ordered the defendants to comply with its declaratory judgment "by appropriately and constitutionally funding the state's ELL programs" by the end of the 2005 legislative session. *Id.* at 393. The State again did not appeal.

In December 2005, the district court granted a motion to impose sanctions against the defendants to compel compliance. Pet. App. 173a-174a. The court noted that, as a result of the State's "egregious delay," *id.* at 167a, "[t]housands of children . . . have now been impacted by the State's continued inadequate funding of ELL programs," *id.* at 156a.

D. HB 2064, And The Rule 60(b) Motion

1. In March 2006, Arizona HB 2064 became law without the signature of the governor. Pet. App. 20a-21a; *id.* at 268a-334a. HB 2064 embodies the legislature's selected approach to designing and funding ELL programs and complying with the EEOA. The legislature accordingly explained in HB 2064 that it "intends to enact a comprehensive, efficient and cost-effective program of developing research based models of structured English immersion that comply with all state and federal laws" and of "funding the incremental costs of [those] research based models." *Id.* at 332a.

HB 2064 states the "legislature['s] belie[f]" that "the amount of monies spent on English language learners" is "important," as is "the way the monies will be spent." Pet. App. 333a. The law increased the Group B weight for ELL students from $340 to $450 per student, but expressly conditioned that increase on the district court's determination that HB

2064 constitutes "appropriate action to establish a program that addresses the orders in [this] case." *Id.* at 333a-334a. HB 2064 also established a statewide "structured English immersion fund" ("SEI Fund"). Districts whose incremental ELL costs exceed their Group B weight funds may apply to the SEI Fund to cover those excess costs. *Id.* at 22a, 284a-286a. In addition, HB 2064 created a task force to "develop and adopt research based models of structured English immersion programs." *Id.* at 282a. The task force was charged with establishing procedures for school districts to determine the "incremental costs" of the approved ELL models they select. *Id.* at 284a. HB 2064 declares that the costs of implementing the new [ELL] programs cannot be determined until" the "task force develops the research based models." *Id.* at 332a.

HB 2064 also contains two significant restrictions. First, it cuts off Group B weight funding for any ELL student after two years regardless of continuing need for ELL services. The SEI Fund likewise provides no funding for any ELL student after two years. Pet. App. 22a, 286a. And although HB 2064 creates a statewide compensatory instruction fund potentially covering students who remain ELL-classified after two years, funding is highly limited, *id.* at 108a (total of $74 per ELL student), and can be used only for programs outside ordinary school hours rather than for normal classroom instruction, *id.* at 304a-306a. Second, when seeking SEI funding to cover ELL program costs in excess of Group B weight funding, a school district must first deduct from its SEI request the amount of all federal funds received under Title III of NCLB, certain federal

funds received under Titles I and II of NCLB, and desegregation funds received under Arizona law. *Id.* at 23a-24a.

2. In March 2006, the Speaker of the Arizona House of Representatives and President of the Arizona Senate ("the legislator-intervenors") filed a motion to intervene to defend HB 2064 and "otherwise to defend the interests of the Legislature." J.A. 56. The district court denied intervention of right but granted permissive intervention. Pet. App. 175a.

Subsequently, the legislator-intervenors, ultimately joined by the Superintendent, moved under Rule 60(b)(5) to purge the sanctions order and to dissolve the court's 2005 and 2001 injunctions and the initial 2000 declaratory judgment. Motion to Purge and Dissolve (Dkt. #422) (filed Mar. 24, 2006). They argued that HB 2064 had satisfied the court's orders and the EEOA's "appropriate action" requirement, and also that significant changes in fact and law justified dissolving the orders. The State opposed the motion on the ground that HB 2064 failed to provide funding rationally related to the costs of an appropriate ELL program. Br. of State (Dkt. #415), at 3 (filed Mar. 24, 2006). It later observed that "until recently there [had been] consensus that compliance required a determination of the actual costs of implementing Arizona's chosen ELL programs and payment of those costs." State's Evidentiary Hearing Br. (Dkt. #592), at 3 (filed Jan. 4, 2007).

In April 2006, the district court concluded that HB 2064 "fails to satisfy" its 2000 order or "comply with Federal Law," Pet. App. 187a, because it has no "rational relationship to the cost of providing an ELL

program" and "has added new hurdles to the mix," *id.* at 179a. The court specifically found that the SEI Fund offset for federal funds violates NCLB's "supplement, not supplant" provisions, Pet. App. 181a-185a, and that the cutoff of Group B and SEI funds after two years is arbitrary. *Id.* at 185a-186a.

Petitioners appealed from that order as well as the previously entered sanctions order. The court of appeals vacated the orders and remanded for an evidentiary hearing. Pet. App. 190a.

E. District Court Remand Decision

On remand, the district court held an eight-day evidentiary hearing. Pet. App. 98a. In March 2007, the district court denied petitioners' motion under Rule 60(b)(5). *Id.* at 96a-116a.

Applying the standard set forth in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), the court found no "changed circumstances that would warrant modification or dissolution of this Court's order." Pet. App. 111a-112a, 116a. The court recognized that there had been improvements in Nogales. *Id.* at 99a-100a. It found, however, that "[s]uccess" at the high school level "was not being achieved," and that improvements throughout the system were "fleeting at best." *Id.* at 100a. That was particularly true because the State had yet to establish "clear rules and requirements that can be fulfilled and followed," or a funding system that rationally related funding to an appropriate program. *Id.* at 100a, 115a.

Evidence at trial supported the court's findings. For instance, despite the expectation under HB 2064

that ELL students would become English proficient within two years, Nogales ELL students required an average of four to five years to be reclassified. Pet. App. 108a. And only 59% of Arizona ELL students ever graduate, which petitioners' own witness described as unacceptable. J.A. 195.

Although changes in testing made any analysis of test results difficult, Pet. App. 33a, the available data confirmed that serious problems remained, particularly at the high school level. For instance, Nogales's ELL tenth graders substantially underperformed both Nogales's ELL third graders and ELL tenth graders statewide. *Id.* at 38a-39a. And Nogales's high schools ranked "at the bottom of the heap" for ELL performance statewide, *id.* at 40a, which petitioners' witnesses considered unacceptable, J.A. 193-195.

While there were improvements in teacher qualifications and class size, serious programmatic deficiencies remained, and those deficiencies reflected resource constraints. Nogales lacked sufficient funds to compete for the most qualified teachers. It therefore relied on long-term substitutes rather than permanent teachers, and on teachers who obtained only emergency certification. Pet. App. 36a; Tr. Day 6, at 48-49. Nogales also could not pay for the teacher aides or tutors who were considered essential to an effective program. J.A. 322-337.

In addition, average class sizes remained high. The State's monitoring report revealed that one Nogales middle school had an average 31 students per class. J.A. 331. No schools approached the teacher-student ratio identified by the Arizona Department

of Education as its only research-based model for ELL instruction. Tr. Day 3, at 95-100.

State funding for ELL programs also bore no relation to the costs of an appropriate program. In fact, petitioners made no effort to establish the incremental costs of an appropriate program of ELL instruction. The evidence showed that in 2005-06, Nogales expended $1,570.42 per ELL student for a program that was still seriously deficient. Pet. App. 41a. That expenditure was "over three times the Group B level weight funding Arizona provides for ELL programs under either HB 2010 or HB 2064." *Id.* Moreover, because of its two-year cut-off, HB 2064 would effectively reduce group B weight funding from $365 per student to $182 per student. *Id.* at 107a. And HB 2064's reliance on federal funding in violation of the federal "supplement, not supplant" provisions added to its inadequacy. *Id.* at 113a-114a. Finally, while there were modest increases in state base-level funding, those funds could be used for ELL programs only by cutting into the general programs. Pet. App. 42a-43a.

F. The Court Of Appeals' Decision

Petitioners appealed from the denial of their Rule 60(b) motion, and the court of appeals affirmed. Pet. App. 1a-91a. Relying on *Rufo* and *Agostini v. Felton*, 521 U.S. 203, 215 (1997), the court noted that Rule 60(b)(5) relief is warranted when a party seeking relief shows "a significant change either in factual conditions or in law." Pet. App. 49a (citations and internal quotation marks omitted). The court understood that this is a "general, flexible standard," *id.* at 49a, but explained that Rule 60(b) "may not be used

to remedy a failure to contest in the first instance the legal rulings underlying the judgment itself," *id.* at 51a. The court therefore declined to revisit the legal determinations underlying the initial judgment and subsequent injunctions. *Id.* at 50a-51a.

Applying those principles, the court concluded that the district court did not abuse its discretion in denying the Rule 60(b)(5) motion. Based on the record, the court of appeals found that resource constraints had resulted in "persistent achievement gaps" between ELL students and other students in Nogales. Pet. App. 66a. And it also determined that resource constraints caused ongoing, serious programmatic deficiencies in teachers, tutors, teacher aides, and class size. *Id.* The court therefore concluded that the record did not "call into serious question [Nogales's] need for increased incremental funds." *Id.* at 64a-65a.

With respect to HB 2064, the court of appeals agreed that the "two-year funding cut-off alone renders the law inadequate as a funding scheme rationally grounded in the costs of providing ELL programs." Pet. App. 84a. It also concluded that HB 2064 violated federal "supplement, not supplant" provisions, seriously jeopardizing Arizona's federal education funds. *Id.* at 86a. Finally, the court rejected petitioners' contention "that state compliance with NCLB benchmarks should be enough to satisfy the EEOA, and hence the judgment." *Id.* at 72a-80a.[3]

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[3] While the case was pending in the court of appeals, the task force completed a set of instructional models. *See* Arizona

SUMMARY OF ARGUMENT

The district court held in 2000 that Arizona had systematically violated the EEOA through an "arbitrary and capricious" funding system that bore no rational relation to the resources needed for appropriate ELL programs. As a result of that arbitrary funding system, programs for ELL students in Nogales suffered from serious deficiencies, including excessive class sizes, a shortage of qualified teachers and teacher aides, and inadequate teaching materials and tutoring programs. The court imposed a remedy directly related to that violation, ordering that the State identify the elements of an effective ELL program, determine the costs of such a program, and then ensure funding rationally related to

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ELL Task Force, Structured English Immersion Models (Apr. 10, 2008), *available at* http://azed.gov/ELLTaskForce/2008/SEIModels04-10-08.pdf. In April 2008, the State enacted SB 1096, which made the first appropriation to the SEI Find for fiscal year 2008-09. Notice of Appropriation (Dkt # 726), at 1 (filed Apr. 11, 2008). The court set an evidentiary hearing to resolve, among other issues, "whether the newly-developed task force models "are rationally funded," and whether "the January 24, 2000 judgment has been satisfied." Order of July 24, 2008 (Dkt. #770), at 1. The hearing was conducted in November 2008, but the court had not yet ruled at the time this Court granted the petitions for writs of certiorari. Pursuant to the parties' stipulation, the district court has stayed all proceedings until this Court's decision. Order of Jan. 16, 2009 (Dkt. #860). On February 12, 2009, the Superintendent announced that he was cutting this year's SEI Fund appropriation request by almost 75%, from $40.6 million to $8.8 million. Thomas C. Horne, 2009 State of Education Speech 13, *at* http://www.ade.state.az.us/administration/superintendent/articles/2009StateofEducationSpeech.pdf.

those program costs. The court's approach accorded with the State's own representations that it was already conducting a study to identify appropriate ELL programs and determine their costs, and also with the State's chosen policy for coming into compliance with the EEOA.

The district court never directed the State to implement any particular ELL programs, instead leaving identification of the attributes of appropriate ELL programs entirely to state officials. The court also never directed the State to adopt a particular method for determining the costs of an appropriate ELL program, instead leaving it to the State to assess program costs. And the court never ordered the State to adopt any particular funding model for ELL programs or to spend any particular amount of money on ELL programs, instead ordering only that the State ensure that funding—whatever the method or source—bear a non-arbitrary relationship to the actual costs (calculated by the State itself) of an appropriate ELL program (devised by the State itself). The district court's remedial approach is fully consistent with this Court's remedial standards. *See Missouri v. Jenkins*, 515 U.S. 70, 88 (1995).

Rule 60(b)(5) does not permit petitioners now to revisit the basic legal premises of the court's earlier orders. Instead, petitioners bear the burden of showing a "significant change" in facts or law such that continued injunctive relief is no longer equitable. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 393 (1992). Because petitioners sought complete dissolution of the court's remedial orders, they were required to show that the significant factual changes

on which they relied would enable full compliance with the EEOA and would remain durable over time, thus justifying an end to all judicial supervision despite the systematic violations of the EEOA that prompted the original order.

The district court acted within its discretion in finding that petitioners failed to make that showing. To begin with, Arizona's operative law governing ELL programs and funding, HB 2064, offers no assurance that the State is taking appropriate action to overcome language barriers in Nogales or elsewhere. In two important ways, HB 2064 in fact marks a step backward. First, HB 2064 cuts off almost all funding for ELL students after two years, despite overwhelming evidence that attaining English proficiency frequently takes substantially longer. In Nogales, HB 2064 has the effect of drastically reducing funds for ELL programs, returning state support to the same levels that resulted in the grave deficiencies identified by the court in 2000. Second, HB 2064 directly contravenes federal "supplement, not supplant" provisions by requiring school districts to offset federal monies from their requests for state ELL program funding. Petitioners therefore cannot demonstrate fulfillment of the court's orders based on HB 2064.

While petitioners point to changed factual circumstances apart from HB 2064, they cannot avoid the central salience of the State's governing method for delivering and funding ELL programs when assessing whether the district court was required to grant them complete relief. In any event, even aside from HB 2064, the district court did not abuse its

discretion in concluding that circumstances in Nogales failed to warrant complete dissolution of its remedial orders. The court found continuing deficiencies in Nogales's ELL programs at the high school level, and also concluded that the district's successes at all levels had not been shown to be durable. Those findings are supported by the record, and the court acted within its discretion in declining to dissolve its orders in the absence of sound evidence of material and durable change.

Petitioners fare no better in contending that, after NCLB's enactment, a state's mere possession of an approved NCLB plan automatically satisfies its EEOA obligation to take appropriate action to overcome language barriers. Nothing in the terms or context of either statute supports that conclusion. Had Congress intended for approval of an NCLB plan to establish compliance with the EEOA, Congress would have said so explicitly, particularly given that the Secretary's approval of an NCLB plan involves no substantive review of the adequacy of the State's ELL programs. And whereas the EEOA imposes mandatory duties on all states and provides for private actions resulting in judicial remedies, NCLB involves duties voluntarily assumed by states and provides for enforcement by administrative action alone. NCLB also is narrower in substantive scope than the EEOA in several respects and broader in others, confirming that NCLB supplemented rather than displaced the EEOA. In short, there is no basis for inferring an implicit intention by Congress that a state's possession of an approved NCLB plan—which every state now possesses—

would somehow automatically establish compliance with the EEOA.

ARGUMENT

I. IT IS UNCLEAR WHETHER THE COURT OF APPEALS HAD JURISDICTION OVER THE APPEAL

This Court "has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). It appears that the legislator-intervenors lacked authority to appeal the district court's order, and it is unclear whether the Superintendent possessed authority. If neither had authority to appeal, the court of appeals lacked jurisdiction over the appeal.

With respect to the Speaker of the House and President of the Senate, they sought to appeal as representatives of the state legislature. Such representatives possess standing to appeal in federal court only when state law authorizes the legislature to represent the State's interests in litigation. *See Karcher v. May*, 484 U.S. 72, 82 (1987). The Arizona Supreme Court has held that the Arizona Constitution precludes the state legislature from representing the state's interests in litigation, because litigating is an executive function and the Arizona Constitution bars the legislature from exercising an executive function. *State ex rel. Woods v. Block*, 942 P.2d 428, 434-37 (Ariz. 1997). The legislature thus may not intrude on the executive's constitutional authority based simply on dissatisfaction with the execu-

tive's litigation judgments. *Id.* at 429-31. It therefore appears that the legislator-intervenors may have lacked standing to appeal.

With respect to the Superintendent, he was a named defendant and the judgment and injunctions run against all defendants. But because the Superintendent was sued in his official capacity, the State is the real party in interest, *see Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989), and the State decided not to appeal. HB 2064 authorized the Superintendent to hire outside counsel for this litigation, Pet. App. 330a, but does not by terms authorize the Superintendent to represent the State's interest by appealing when the State is a named party and declines to appeal. Nor does the legislation purport to give to the Superintendent policymaking authority over matters covered by the judgment. That policymaking authority instead remains with the State Board of Education, A.R.S. § 15-251(3), (5), which made a policy decision not to appeal. It may be that, under the Arizona Constitution, only the Governor could have resolved the conflict within the Executive Branch by directing an appeal. *See Ariz. State Land Dep't v. McFate*, 348 P.2d 912, 918 (1960). It is therefore unclear whether the Superintendent had standing to appeal.

The question of authority to appeal is particularly important because the State and State Board of Education not only declined to appeal; they also defended the district court's denial of petitioners' Rule 60(b) motion. The court of appeals was therefore "in the uncomfortable position of mediating between state officials with regard to the execution of an obli-

gation of the state as a whole." Pet. App. 55a. That uncomfortable position would not exist if petitioners lacked authority to appeal. If this Court determines that neither the legislator-intervenors nor the Superintendent had authority, it should vacate the Ninth Circuit's decision and direct that it dismiss the appeals.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PETITIONERS' MOTION FOR COMPLETE DISSOLUTION OF THE ORDERS

A. The District Court's Orders Sought To Remedy A Systemic EEOA Violation And Appropriately Tracked The State's Preferred Method For Achieving EEOA Compliance

1. a. The Equal Educational Opportunities Act of 1974 (EEOA) provides that "[n]o State shall deny equal education opportunity to an individual" by "the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." 20 U.S.C. § 1703. In 2000, the district court determined that the State of Arizona had systematically violated that statutory prohibition. First, the court found that state funding for ELL programs was "arbitrary and capricious" and bore no relationship to the actual funding needed to ensure that students learn essential skills. Pet. App. 150a. And second, it found that the State's inadequate funding system produced serious deficiencies in the ELL program at Nogales, including excessive

class sizes, insufficient qualified teachers and teacher aides, and inadequate tutoring programs and teaching materials. *Id.* at 149a-150a.

Based on those findings, the court concluded that "Defendants are violating the EEOA because the State's arbitrary and capricious [ELL] appropriation is not reasonably calculated to effectively implement the [ELL] theory which it approved." *Id.* at 150a. The court further concluded that "Defendants are violating the EEOA because . . . despite the adoption of a recognized [ELL] program in [Nogales], the State has failed to follow through with practices, resources and personnel necessary to transform theory into reality." *Id.* at 151a.

To remedy the systemic EEOA violation, the district court refrained from directing implementation of any particular programs or dedication of any specific funding amounts. *Compare Milliken v. Bradley*, 433 U.S. 267, 288-89 (1977) (directing the State to pay one-half the costs of four specific remedial education programs). Instead, the court's approach, from the outset, allowed the State to determine both the elements of an appropriate ELL program and the program costs. The sole constraint imposed on the State was that funding bear a rational relationship to the costs the State itself determined necessary to implement the programs the State itself devised. Pet. App. 150a; J.A. 44, 393.

b. The district court's remedial approach accorded with the State's own desire to fulfill its responsibilities under the EEOA by completing an ongoing study of appropriate ELL programs and their costs. Pet. App. 150a. The State informed the court

before the 2000 declaratory judgment that a legislative committee had been formed to conduct "a detailed analysis of which bilingual programs work and which do not, as well as the amount of money that is currently being spent and the amount of money that *needs* to be spent on bilingual programs." Defendants' Trial Mem. (Dkt. #189), at 5 (filed Sept. 17, 1999). After the judgment, the State reiterated that "Defendants agree that the actual costs of providing an appropriate, state-wide system of English Acquisition Programs must be ascertained." Defendants' Resp. (Dkt. #207), at 1 (filed Aug. 18, 2000).

The court's remedial approach also built upon the State's policy decision, manifested in its statutory scheme, to provide local school districts with incremental funding for ELL programs. Pet. App. 149a. The Legislature renewed its commitment to that approach in HB 2064, stating that the State intends to develop "research based models of structured English immersion that comply with all state and federal laws" and to "fund[] the incremental costs of the research based models that are in addition to the normal costs of conducting programs for English proficient students." *Id.* at 332a. As the State observed in 2007, "until recently there was consensus that compliance required a determination of the actual costs of implementing Arizona's chosen ELL programs and payment of those costs." State's Evidentiary Hearing Br. (Dkt. #592), at 3 (filed Jan. 4, 2007). Also, the court's remedial orders were modeled on the approach adopted by the Arizona Supreme Court in implementing the Arizona Constitution's guarantee of a "general and uniform public school system," Ariz. Const. art. XI, § 1. Pet. App.

148a, 150a; *see Roosevelt Elem. Sch. Dist. v. Bishop*, 877 P.2d 806 (Ariz. 1994). The Arizona Supreme Court has held that, to satisfy that requirement, the State must establish minimum standards and, "[o]nce a standard is set, the legislature must choose a funding mechanism that does not cause substantial disparities and that ensures that no school in Arizona falls below the standard." *Hull v. Albrecht*, 950 P.2d 1141, 1145 (Ariz. 1997).

c. The district court's approach also accorded with remedial standards established by this Court: that a remedy (i) "relate[] to" the violation; (ii) be designed "to restore the victims of [the unlawful] conduct to the position they would have occupied in the absence of such conduct"; and (iii) "take into account the interests of state and local authorities in managing their own affairs." *Milliken*, 433 U.S. at 280-81; *Missouri v. Jenkins*, 515 U.S. 70, 87-88 (1995). First, as the district court found, appropriate EEOA programs cost money, and the State's failure to ensure funding rationally related to the costs the State itself found necessary for ELL programs had caused the widespread deficiencies in the Nogales program. The district court's remedy directly related to that violation. Second, the court's remedy aimed to assure that the student victims of the State's violation were afforded the learning opportunities they had been unlawfully denied. And third, because the remedy was based on the State's preferred method for complying with the EEOA, it fully respected the State's interests in managing its own affairs.

In light of the nature of the violation and the State's preferred approach to compliance, there was

no alternative remedy that would have equally fulfilled those three remedial requirements. The remedy therefore was "essential." 20 U.S.C. § 1712.[4]

2. Notwithstanding the State's representations to the district court, the State, over the course of the next seven years, failed to determine the elements of an appropriate ELL program; failed to calculate the costs of such a program; and failed to relate funding for ELL programs to an assessment of the costs of an appropriate program. During that time, the district court took increasingly specific actions to bring about compliance with its judgment.

While the court initially issued a declaratory judgment, it subsequently issued an order requiring the State to determine the costs of an appropriate ELL program. J.A. 39. When that order failed to produce compliance, the court directed that the State's funding for ELL programs "shall not be arbitrary and capricious, but shall bear a rational relationship to the actual funding needed to implement language acquisition programs in Arizona's schools." J.A. 44. And when that order too failed to produce compliance, the court directed the State to comply with its original judgment by "appropriately and

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[4] Although the legislator-intervenors attempt to invoke the remedial standards set forth in 20 U.S.C. § 1713, *see* Legislators' Br. 56, those standards by their plain terms apply only to *busing* remedies and thus have no application here. The legislator-intervenors likewise err in relying on the requirement in 20 U.S.C. § 1758 to give a school district notice and an opportunity to develop a voluntary remedial plan. *See* Legislators' Br. 56, 59. That requirement by its plain terms applies exclusively to *desegregation* remedies.

constitutionally funding the state's [ELL] programs." J.A. 393. In light of the State's repeated failure to comply with the 2000 judgment, the district court was fully justified in taking increasingly specific measures to induce compliance. *See Hutto v. Finney*, 437 U.S. 678, 688 (1978) ("[T]aking the long and unhappy history of the litigation into account, the court was justified in entering [an order] to insure against the risk of inadequate compliance.").

By the time of the 2007 hearing on petitioners' motion for relief under Rule 60(b)(5), the State still had yet to complete the process of establishing standards for an appropriate ELL program, much less identify the program costs. As the district court found, "many of the new standards are still evolving," and the State had not "established clear rules and requirements that can be fulfilled and followed." Pet. App. 100a. And the State still had not developed a "funding system that rationally relates funding available to the actual costs of all elements of ELL instruction." *Id.* at 111a.

3. The district court accordingly has never ordered funding for funding's sake. Instead, it has consistently tailored its orders to the costs that the State itself determined were necessary for an appropriate ELL program that the State itself devised. Even then, the court has required nothing more than a non-arbitrary relationship between funding and the costs of an appropriate program. And until recently, the court's approach accorded with the uniform views of the state parties on how the State would fulfill its EEOA obligations.

The district court's approach is not at all inconsistent with petitioners' repeated refrain that more money does not necessarily mean more effective programs, and that improved management can increase program effectiveness while reducing program costs. If the State were to determine that an appropriate program could be delivered at far less cost by improving program management, nothing in the district court's order stands in the way of the State's implementing that judgment: The district court has required only that the State's funding scheme not be arbitrary in relation to the State's own calculation of the costs of appropriate ELL programs that the State itself devises.[5]

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[5] The district court's orders are wholly unlike the order disapproved by this Court in *Missouri v. Jenkins*, 515 U.S. 70 (1995). *See* Legislators' Br. 64-65; Superintendent's Br. 35-37, 49. That case addressed the imposition, as court-ordered remedies, of educational programs and facilities "not available anywhere else in the country," including a planetarium, green house, 25-acre farm, broadcast radio and television studios, temperature-controlled art museum, and movie editing and screening rooms. 515 U.S. at 79-80. Those programs and facilities aimed to attract private school and suburban students, an objective unconnected to remedying the constitutional violation in the case. *Id.* at 91-92. And the district court had permitted the plaintiffs and school districts to impose "the brunt of the costs" on the State. *Id.* at 79. Here, by contrast, the district court's orders allow the State to determine the programs necessary to overcome language barriers; the costs of those programs; and the funding for the programs, provided that funding bears a non-arbitrary relationship to program costs.

B. Petitioners May Not Relitigate The Validity Of The Court's Orders But Must Establish That A Significant Change In Fact Or Law Justifies Their Complete Dissolution

1. Against this backdrop of noncompliance, petitioners moved for relief from judgment pursuant to Rule 60(b)(5). Petitioners principally argued that the recently enacted HB 2064 satisfied the judgment. They also argued that improvements in the State's ELL program aside from HB 2064 warranted relief from judgment. The State itself opposed petitioners' motion, and a number of important principles govern the motion's proper resolution.

a. First, a motion for relief from judgment "is not a substitute for an appeal." 11 Wright, Miller & Kane, *Federal Practice & Procedure* § 2863, at 340 (2d ed. 1995). The movant thus may not attack the legal or factual validity of the underlying judgment. *Id.* That rule is grounded in basic principles of finality. An injunction, like any judgment, has attributes of "[f]irmness and stability," and "neither the plaintiff nor the court should be subjected to the unnecessary burden of re-establishing what has once been decided." *System Fed'n v. Wright*, 364 U.S. 642, 647 (1961).

Those basic principles of finality apply to injunctions directed to a state and its officials no less than injunctions directed to any other litigant. *See Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 391-92 (1992) (court entertaining a motion under Rule 60(b) should not inquire whether some provisions in the decree "could have been opposed with success if

the [government] defendants had offered opposition"). In such cases—as in all cases—Rule 60(b)(5) "does not allow relitigation of issues that have been resolved by the judgment." 11 Wright, Miller & Kane, *supra*, § 2863, at 340.

b. Second, in light of those finality considerations, a party seeking relief from judgment "must establish that a significant change in facts or law warrants revision of the decree." *Rufo*, 502 U.S. at 393. In cases involving an injunction directed to a state or its officials, that standard is particularly "flexible." *Id.* And in the event of a significant change, a court must give "significant weight" to the views of state officials on how to modify the judgment. *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 441-42 (2004) (quoting *Rufo*, 502 U.S. at 392 n.14). But it remains a precondition to such "flexibility" and "weight" that the movant demonstrate "a significant change in facts or law" warranting an "amendment." *Id.* at 441 (quoting *Rufo*, 502 U.S. at 392 n.14). Dissatisfaction with the decree—or with the decision of prior officials not to challenge the decree—fails to suffice. *Rufo*, 502 U.S. at 383, 391-92. And the burden rests squarely on the party seeking relief to establish changed circumstances warranting relief. *Id.* at 393.

c. Third, once the purposes of a decree have been fully satisfied, "responsibility for discharging the State's obligations" must be "returned promptly to the State and its officials." *Frew*, 540 U.S. at 442. At the same time, a party seeking to vacate a judgment based on satisfaction of its purposes cannot gain relief simply by demonstrating some measure of improvement in the underlying conditions giving rise

to the decree, particularly when the improvements may be fleeting. Full satisfaction of the purposes of a judgment can arise only when the violation and its effects are fully corrected and unlikely to recur. *Bd. of Educ. v. Dowell*, 498 U.S. 237, 247 (1991). In resolving that issue, a court considers whether there has been "good faith" compliance with the court's orders for a "reasonable period of time." *Id.* at 248-49.

2. Under those principles, petitioners were not free to litigate in their Rule 60(b)(5) motion the essential legal premises of the 2000 declaratory judgment and subsequent injunction orders. In particular, they could not revisit whether the lack of funding rationally related to the costs of a chosen ELL program can constitute a component of an EEOA violation. More fundamentally, they also could not revisit whether a district court possesses remedial authority to direct a state to ensure funding bearing a non-arbitrary relationship to the costs of the State's chosen ELL programs. Those issues were resolved in the court's 2000, 2001, and 2005 orders, and therefore were not open for relitigation on a Rule 60(b)(5) motion to dissolve those orders. *E.g.*, *System Fed'n*, 364 U.S. at 647.[6]

For the same reason, neither respondents nor the district court were required to reestablish *ab initio* the need for the court's remedial orders. *System*

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[6] That finality principle applies to the legislator-intervenors even though they were not parties to the earlier orders because they seek to dissolve orders directed to the State (not to them), and because, insofar as they have standing at all, it is to represent "the interests of the State." *Karcher*, 484 U.S. at 76, 80.

Fed'n, 364 U.S. at 647. Petitioners instead were required to demonstrate that, although the court's remedy lay within its authority when issued, the remedy no longer remained essential to assure compliance with the EEOA because of factual changes brought about by HB 2064 or other improvements in the State's ELL program. *See Rufo*, 502 U.S. at 393; 20 U.S.C. § 1712.

In addressing that issue, the district court faced conflicting views from the State and its officials. On one hand, the State and its Board of Education asserted that the judgment's purposes remained unfulfilled and that the existing orders thus remained necessary. On the other hand, the Superintendent and legislator-intervenors asserted that the purposes of the judgment had been fulfilled, rendering the court's orders unnecessary. Unlike the situation in *Rufo* and *Frew*, there was no uniform state view to which the district court could give "significant weight." *Frew*, 540 U.S. at 441-42.[7]

Finally, insofar as petitioners sought relief on the ground that the purposes of the original judgment had been fully satisfied through HB 2064 or other significant changes, they could not rely on partial

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[7] Contrary to the view of the legislators (*see* Legislators' Br. 40), each side must also be presumed to be acting in good faith. *See Miller v. Johnson*, 515 U.S. 900, 915-16 (1995). There is no basis for assuming that those representing the State and its Board of Education, by opposing the motion to dissolve, are shirking their state-law responsibilities to achieve political ends. And there is also no basis for presuming that petitioners, by seeking dissolution of the orders, are shirking their *federal*-law responsibilities to achieve political ends.

improvements in State compliance or improvements not shown to be durable. *Dowell*, 498 U.S. at 247-49. Instead, petitioners were required to show that their identified changes fully corrected the previous systemic violation of the EEOA and would ensure sustained compliance. *See id.* at 248 (dissolving desegregation decree is proper "after the local authorities have operated in compliance with it for a reasonable period of time").

Applying those principles, the district court acted within its discretion in declining to dissolve its orders based on HB 2064 or the other changes emphasized by petitioners. *See System Fed'n*, 364 U.S. at 648 (a district court has "wide discretion" to determine whether to vacate or modify a judgment in light of changed circumstances).

C. The Flaws In HB 2064 Preclude Dissolution Of The Court's Orders

In the district court, petitioners principally argued that HB 2064 brought the State into compliance with the EEOA and satisfied the court's previous orders. *See* Motion to Purge and Dissolve (Dkt. #422), at 1 (filed Mar. 24, 2006). Petitioners now seek to disassociate themselves from HB 2064 and rely instead on other asserted factual changes.

Petitioners, however, cannot escape the central relevance of HB 2064 in assessing whether the district court acted within its discretion in denying Rule 60(b)(5) relief. HB 2064 embodies the State's current and chosen approach to providing ELL programs and complying with its EEOA obligations. *See* p. 10, *supra*. It is the law that now governs the

actions the State will take in fulfilling EEOA requirements. If HB 2064 fails to provide sufficient assurance that the State will satisfy its EEOA obligations, the district court acted within its discretion in declining to vacate its orders. That would remain true even if state law before HB 2064 had assured EEOA compliance: It is HB 2064, not prior law, that presently governs the State's actions in fulfillment of the EEOA; and it is thus HB 2064, not prior law, that must assure EEOA compliance.

Petitioners' effort to sidestep HB 2064 is unsurprising. The law contains at least two flaws that preclude any showing that action in conformity with it could satisfy the purposes of the 2000 judgment. HB 2064 in those respects in fact sets back the State's ability to fulfill its EEOA obligations.

First, HB 2064 cuts off all Group B and SEI funding for ELL students after two years. Pet. App. 106a-107a. The district court found, however, based on uncontroverted evidence, that "two years is insufficient for many English Language Learners." *Id.* at 108; *see id.* at 105a-110a, 114a-115a. In Nogales, for example, it takes an average of "four to five years [for ELL students] to be reclassified as English proficient." *Id.* at 108a. Although HB 2064 provides certain funds for compensatory instruction beyond two years, those funds are highly limited and may be used only for summer or before- or after-school programs rather than ordinary classroom instruction. *Id.* at 107a. The district court calculated that, by limiting funding to two years in the face of a need for four to five years, HB 2064 effectively *reduces* annual group B weight funding for ELL students from

$365 to $182. *Id.* That change would turn back the clock to funding levels in 2000-01, when severe resource shortages led to the district court's finding of systemic EEOA violations. *See id.* at 41a, 90a.

Second, HB 2064 offsets against a school district's SEI funding the amount of the district's federal funding under Titles I-III. *See* A.R.S. § 15-756.01(I). Under the offset prohibition of NCLB, however, a "State shall not take" that federal funding "into consideration" when "determining the eligibility of any local educational agency [for] State aid, or the amount of State aid." 20 U.S.C. § 7902. And under the "supplement, not supplant" provisions in Titles I-III, federal funds must "supplement" other available funds "and in no case . . . supplant" them. *Id.* §§ 6314(a)(2)(B), 6315(b)(3), 6613(f), 6825(g). HB 2064's offset for federal funds flatly violates both the offset and the "supplement, not supplant" prohibitions. Pet. App. 86a, 113a-114a.[8] That feature of HB 2064, like its two-year cut-off, precludes petitioners from showing that the law satisfies the purposes of the judgment: While HB 2064 relies on federal funding to fulfill the State's EEOA obligations, federal law bars that approach.

Those two features of HB 2064 are of central significance in assessing whether the district court acted within its discretion in denying petitioners' Rule 60(b)(5) motion. The law's "stark two-year cut-off," when "combined with the very real possibility

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[8] *See* J.A. 129-131 (expert testimony by former director of policy for Title I programs that "I've never seen such a blatant violation").

that the funding scheme may trigger federal enforcement action, may well reverse or retard whatever progress has been made." Pet. App. 89a-90a. With HB 2064 as the operative law, petitioners cannot demonstrate fulfillment of the purposes of the original judgment.

2. It bears noting that, absent its two fatal flaws, HB 2064 could potentially form the basis of a funding scheme that would satisfy the district court's judgment. Indeed, the district court recently indicated as much. Pet. App. 90a; J.A. 88-91. The court determined that HB 2064's structure for distributing state ELL funds—whereby the State promulgates instructional models, school districts calculate the models' incremental costs, and the SEI Fund makes up the shortfall in available funding—could bear a rational relation to the costs of the new ELL programs. *Id.* The court reached that conclusion even though HB 2064 takes a district-by-district rather than per-student approach to funding, and takes into account the funds available to districts from local sources.

The court thereby made clear its flexibility on the State's particular method of ensuring compliance with the EEOA and its willingness to defer to the State's policy choices. With the ELL instructional models contemplated by HB 2064 now having been completed while the case was pending in the court of appeals, the court of appeals saw "reason . . . to hope" that, if the specific deficiencies in HB 2064 were corrected, this litigation might "finally be nearing resolution." Pet. App. 90a. At this stage, however, the district court acted within its discretion in

declining to grant Rule 60(b)(5) relief on the basis of HB 2064.

D. The Other Factual Changes Identified By Petitioners Fail To Compel Dissolution Of The Court's Orders

Petitioners argue that improved ELL performance and programs and increased funding at Nogales demonstrate fulfillment of the judgment. As an initial matter, petitioners' focus on one school district is misplaced. The orders are state-wide orders, and although petitioners question the validity of the orders insofar as they extend beyond Nogales, that issue was resolved by the earlier orders and acquiesced in by the State. Indeed, the State affirmatively urged a statewide remedy because a "Nogales only" remedy "would run afoul of the Arizona Constitution's requirement" of "a general and uniform public school system." State C.A. Br. 60 (quoting Ariz. Const. art. XI § 1(a)). The state-wide nature of the court's orders therefore may not be revisited in a Rule 60(b)(5) motion. *E.g.*, *System Fed'n*, 364 U.S. at 647.

In any event, petitioners failed to establish fulfillment of the purposes of the judgment in Nogales. The district court recognized that there had been improvements in Nogales, particularly in the elementary and middle schools. Pet. App. 100a-101a. But it also found that "success at the high schools is not being accomplished." *Id.* at 100a. And it further determined that, absent compliance with its orders, any success would be "fleeting at best." *Id.* Those findings are supported by the record and demonstrate that the district court did not abuse its discre-

tion in declining to grant complete dissolution of its orders based on the improvements at Nogales.

1. Petitioners rely on student performance criteria to show improvements at Nogales. But two of the most pertinent performance criteria—the pace of reclassification and graduation rates—convincingly support the district court's findings. State law calls for students to become "English proficient" in one year, A.R.S. § 15-752, and HB 2064 eliminates funding for almost all ELL education services after two years. But the record revealed that Nogales ELL students now require an average of four to five years to attain reclassification. Pet. App. 108a. There is thus a significant gap between the State's expectations for ELL programs and the on-the-ground reality in Nogales. Of equal, if not greater significance, only 59% of Arizona ELL students graduate from high school, J.A. 195, and current NCLB reports reveal that the graduation rate for ELL students in Nogales is 66%.[9]

Petitioners cite recent performance on AIMS achievement tests as evidence of improvements. *See* Superintendent's Br. 28-29; Legislators' Br. 48. But it is difficult to reach any reliable judgments based on the results of those tests. Arizona has changed the AIMS test during the relevant period, both by altering the pass score and by twice changing the

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[9] *See* Arizona Dep't of Education, School Report Cards, *available at* http://www10.ade.az.gov/reportcard (district-wide 10th grade reports in 2008). ELL subgroup performance data can be obtained from the Department of Education's School Report Cards web site by searching for or selecting the relevant school or district, year, subject, and grade level.

system for reclassifying students. Pet. App. 33a. In addition, there is no longitudinal data that would enable evaluating the progress of individual ELL students over time. *Id.*

Insofar as performance results on the AIMS test were relevant, they support the district court's findings. Nogales's ELL tenth graders performed far worse than its ELL third graders, and far worse than the state-wide averages for tenth graders. Pet. App. 38a-39a. Those results confirm what the other evidence establishes—that there remain serious deficiencies in Nogales's high school program. Moreover, ELL tenth graders failed math at a 76% rate, reading at a 78% rate, and writing at a 76% rate, far worse than the Nogales averages of 50%, 42%, and 39%, respectively. Pet. App. 39a. While some differences between ELL students and other students are to be expected, petitioners' own witness admitted that the performance of Nogales's high school ELL students was "not acceptable." J.A. 193-195; *see also* Tr. Day 6, at 125-126, 129.

In addition, an elementary school, a middle school, and both high schools in Nogales failed to make adequate yearly progress under NCLB. Pet. App. 39a. Petitioners assert (Superintendent's Br. 46) that the failures were unattributable to ELL students. But in a school system composed almost entirely of ELL or reclassified-ELL students, it is difficult to draw any sharp distinction between ELL and non-ELL students. Tr. Day 6, at 16-17. In any event, more recent data for 2006, 2007, and 2008 demonstrate that four of Nogales's 10 schools, including both high schools, failed to make adequate

yearly progress in at least one of those years because of the ELL subgroup.[10]

Petitioners highlight (Superintendent's Br. 46) certain AIMS test data showing that reclassified ELL students are performing as well as English speaking students. But even assuming those data were reliable, *but see* Tr. Day 6, at 113-114, they are far less significant than the slow pace at which students attain reclassification. Petitioners' reliance (Legislators' Br. 48-49) on data comparing Nogales ELL students to statewide averages is similarly unpersuasive. Petitioners note that, in a statewide ranking of 628 schools in 2005, "Nogales placed four schools in the top ten." *Id.* at 49. But they neglect to mention that Nogales's high schools rank "at the bottom of the heap," with Nogales's single largest school—the main high school—ranked in the bottom 10 percent, and its alternative high school ranked in the bottom one percent. Pet. App. 40a.

Petitioners also rely (Legislators' Br. 24) on conclusory statements by state officials (who work for the Superintendent) that Nogales's ELL programs are "excellent" or "exemplary." On cross-examination, however, those officials admitted that ELL student performance at the middle and high school levels was "not acceptable." J.A. 193-195. For all those reasons, the district court acted within its

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[10] *See* Arizona Dep't of Education, School Report Cards, *supra* (district-wide 10th grade reading/writing in 2008, district-wide 8th grade reading/writing in 2007, alternative high school 10th grade math in 2006, Wade Carpenter Middle School 8th grade reading/writing in 2007, Lincoln Elementary School 3rd grade math and 5th grade reading/writing in 2008).

discretion in rejecting petitioners' claim that the performance data compelled granting them complete dissolution of the court's orders.

2. Petitioners contend that, as a result of improved program management, ELL programs in Nogales have achieved success. They cite improvements in class size, teacher quality, teacher salaries, compensatory programs, and instructional materials. Superintendent's Br. 47; Legislators' Br. 45. The record demonstrates, however, that significant programmatic deficiencies remain, and that those deficiencies reflect continuing resource constraints. *See* Pet. App. 36a.

Nogales, for instance, "cannot afford to pay market rates" for qualified ELL teachers. Pet. App. 66a; J.A. 225. It therefore must resort to long-term substitutes and instructors with "emergency" certification. Pet. App. 36a. Nogales also cannot afford teacher aides, even though its superintendent regarded them as "essential" to ELL program success. J.A. 225. Nor can Nogales afford additional tutors, whom the superintendent likewise considered essential. *Id.*

Average class sizes at Nogales remain high and cannot be reduced given current funding levels. The State's monitoring report revealed that one Nogales middle school has an average 31 students per class. J.A. 331. Half of Nogales's schools have average class sizes exceeding the "maximum" size contemplated by the State's newly promulgated models for pre-emergent and emergent ELL students, and 80% of Nogales's schools have average class sizes exceeding the corresponding "target" size. *See* J.A. 322-

337; Arizona ELL Task Force, Structured English Immersion Models, at 5 (Apr. 10, 2008), *available at* http://azed.gov/ELLTaskForce/2008/SEIModels04-10-08.pdf. And no school in Nogales approaches the class-size that the Arizona Department of Education had held out to school districts as its only research-based model for ELL instruction. Tr. Day 3, at 95-100.

3. Petitioners also err in seeking complete dissolution of the court's orders on the ground that Nogales has more funds with which to operate its programs than it had in 2000. Petitioners rely on the following sources of additional funds: Group B funds, federal funds, local funds, and base-level state funds. The district court reasonably concluded that those funding sources failed to assure that improvements would be sustainable, let alone would fully complete the job of providing an appropriate ELL program.

First, petitioners ignore the effect of HB 2064 on Nogales's continuing ability to operate its existing programs. As discussed, the practical effect of HB 2064 may be to halve Nogales's Group B funding for ELL students. Even the amount of Group B funds Nogales currently receives under pre-HB 2064 standards simply matches the amounts Nogales spent on its ELL programs in 2000. Pet. App. 43a & n.26. And the district court found that those programs were seriously deficient.

Moreover, while Nogales has received increased federal funding, under the federal "supplement, not supplant" prohibitions, Nogales may not spend those funds on its core ELL programs. Any current use of

federal money for that purpose violates federal law. While Nogales also has enacted two county overrides since the original district court judgment, there is no guarantee that Nogales can continue enacting such overrides in the future. And the amount of county override funds that Nogales devotes to its ELL programs in any event is exceedingly small—only $43.43 per student, Pet. App. 42a—hardly an amount sufficient to sustain its ELL program.

As a result, petitioners' argument that Nogales possesses adequate funding both to sustain its improvements to date and to remedy any remaining deficiencies ultimately amounts to a contention that Nogales has sufficient, base-level state funding that it can apply—and can continue to apply—to ELL programs. Nogales, however, likewise drew on base-level state funding to support its ELL programs at the time of the initial 2000 judgment. *See* Pet. App. 141a. And Nogales's ELL program at that time constituted a systematic failure. The district court had every reason to doubt petitioners' argument that what only recently produced a systematic failure could now produce enduring compliance.

Indeed, while state base-level funding has grown in certain measure, the extent of the increase when adjusted for inflation (based on the Department of Labor's CPI Index) amounts only to one percent. *See* Pet. App. 43a (listing per-student "[b]ase level state funds" from 1999-2000 to 2006-2006); U.S. Dep't of Labor, Bureau of Labor Statistics CPI Inflation Calculator, *available at* http://www.bls.gov/data/inflation_calculator.htm. Moreover, there are now additional competing demands on the base-level funds.

Local districts, for example, must satisfy NCLB adequate yearly progress standards for all students, not just ELL students. That competing demand not only limits the amount of base-level funds that Nogales can draw for ELL programs; it also means that Nogales's draw for ELL programs in the current year may require redirection to general programs in coming years.

Nor does anything in state law *require* Nogales to devote base-level state funds to ELL programs rather than to general academic programs. That is hardly surprising. The State presumably believes that its base-level funding represents the amounts necessary to "ensure that each student receives a basic education." Pet. App. 122a. It would raise issues of substantial public sensitivity if the State were to require school districts to satisfy the State's obligations to ELL students by redirecting base-level funds to them, at the expense of achieving the more general objective of ensuring a basic education for all its students. That is particularly true because Arizona continues to rank near the very bottom in overall state per-pupil spending. *See* ALEC Report Card, at 80 (2008), *available at* http://www.alec.org/am/pdf/ReportCard08.pdf (Arizona ranked 50th).

Any requirement that local districts achieve EEOA compliance by redirecting base-level state funding would also violate the Arizona Constitution. If the State compelled districts with large ELL populations to shift base-level funding to meet EEOA obligations, districts with large ELL populations would have fewer remaining funds to devote to the general academic program than districts with small ELL

populations. That resulting disparity would run afoul of the Arizona constitutional prohibition against the State's causing substantial disparities between districts in meeting its basic educational standards. *See Roosevelt*, 877 P.2d at 815-16.

For those reasons, the district court acted within its discretion in concluding that reliance on base-level state funding (or other funding) failed to assure enduring EEOA compliance. Absent such an assurance, the district court committed no abuse of discretion in declining to grant petitioners a complete dissolution of the court's orders. *See Dowell*, 498 U.S. at 247-49.

E. The Court Of Appeals Correctly Applied The Rule 60(b)(5) Standard

Petitioners contend that the court of appeals failed to apply the correct Rule 60(b) standard. That argument is both incorrect and beside the point.

Petitioners contend that the court of appeals applied the outdated "grievous wrong" standard of *United States v. Swift & Co.*, 286 U.S. 106 (1932), rather than the governing *Rufo* standard. The court of appeals, however, explicitly applied the *Rufo* standard. The court specifically held that that "[i]t is appropriate to grant a Rule 60(b)(5) motion" when "the party seeking relief from an injunction or consent decree [meets its initial burden by showing] a significant change either in factual conditions or in law." Pet. App. 49a (quoting *Agostini*, 521 U.S. at 215) (alteration in original, internal quotation marks omitted). The court of appeals also recognized that this is a "flexible standard." *Id.* at 50a.

Petitioners challenge (Legislators' Br. 37), as inconsistent with *Rufo*, the court of appeals' statement requiring petitioners to show "that the basic factual premises of the district court's judgment had been swept away, or that there has been some *change* in the legal landscape that makes the original ruling now improper." Pet. App. 63a. But that statement is simply a way of explaining how, in the particular context of this case, petitioners could demonstrate the requisite "significant change in facts or law." *Rufo*, 502 U.S. at 393. With respect to the remaining two remarks cited by petitioners (Legislators' Br. 37), one was simply a prediction of the likelihood that the *Rufo* standard would be satisfied in the case of a judgment neither appealed from nor complied with. Pet. App. 60a. And the other was a characterization of a legal conclusion reached by the district court. *Id.* at 72a. Neither affected the court of appeals' analysis of whether petitioners had shown a significant change under *Rufo*.

In any event, petitioners' criticism of certain statements by the court of appeals is ultimately beside the point. The district court articulated the correct standard under *Rufo*. And for the reasons explained, the district court's decision under that standard to deny a complete dissolution of its orders was not an abuse of discretion.[11]

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[11] If this Court determined that both the court of appeals and district court applied an incorrect Rule 60(b)(5) standard, the proper disposition would be to remand to allow those courts to apply the proper standard in the first instance. *See Rufo*, 502 U.S. at 393.

III. THE EEOA'S COMPLIANCE STANDARD HAS NOT BEEN DISPLACED OR QUALIFIED BY NCLB'S FUNDING CONDITIONS

Petitioners contend that the very fact that a state has a NCLB plan that has been approved by the Secretary of Education automatically satisfies a state's obligation under the EEOA to take appropriate action to overcome language barriers. Legislators' Br. Pet. 57; Superintendent's Br. 58. There is no evidence that Congress intended that result.

A. The EEOA Requires A State To Implement Practices, Resources, And Personnel Necessary To Overcome Language Barriers

The text of the EEOA provides that "[n]o State shall deny equal education opportunity" by "the failure by [a State or local] educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." 20 U.S.C. § 1703. Consistent with the ordinary meaning of "take appropriate action," the Fifth Circuit in *Castaneda v. Pickard*, 648 F.2d 989 (1981), held that an educational agency must "actually use[]" "programs and practices" that are "reasonably calculated to implement effectively the educational theory adopted by the school." *Id.* at 1008, 1010. The agency therefore must "follow through with practices, resources, and personnel necessary to transform theory into reality." *Id.*

Castaneda also prescribed two additional inquiries: whether the educational agency's instructional theory is educationally sound, *id.* at 1009, and

whether the implemented programs have, after a reasonable period, resulted in "parity of participation with other students," *id.* at 1009-10. But the key inquiry under *Castaneda* ordinarily is whether an educational agency has followed through with practices, resources, and personnel reasonably calculated to overcome language barriers.

From the time of the decision in 1981 through the enactment of NCLB more than 20 years later, *Castaneda* served as the governing legal standard for compliance with the EEOA. All courts that considered the issue embraced *Castaneda*'s interpretation of the EEOA. *See* p. 2 n.1, *supra*. And the federal agencies responsible for enforcement of the EEOA and the parallel Title VI regulations similarly applied (and continue to apply) *Castaneda* in exercising their enforcement responsibilities. *Id.*

During that period, the relevant EEOA analysis focused on "inputs," such as whether educational agencies provided qualified ELL teachers, *Castaneda*, 648 F.2d at 1012, adequate teacher training, *id.* at 1013, proper student testing, *id.* at 1014, sufficient daily time for learning English, *United States v. Texas*, 680 F.2d 356, 371 (5th Cir. 1982), appropriate criteria for advancing from an ELL program to the general program, *id.*, sufficient funding, *id.* at 372, and adequate monitoring of programs, *Gomez v. Ill. State Bd. of Educ.*, 811 F.2d 1030, 1043 (7th Cir. 1987). Indeed, petitioners recognize that appropriate actions for EEOA purposes included "hiring qualified teachers, employing adequate texts, and reducing class size." Superintendent's Br. 38.

It must be presumed that Congress understood this state of the law when enacting NCLB. *Fitzgerald v. Barnstable Sch. Comm.*, 129 S. Ct. 788, 797 (2009). In particular, Congress presumably knew that the EEOA, for more than twenty years, had been interpreted to require States to put in place practices, resources, and personnel appropriate to overcome the language barriers of ELL students. The question therefore is whether Congress, in enacting Title III of NCLB, intended to replace that long-settled standard for demonstrating a state's EEOA compliance with one simply requiring a state to possess an approved NCLB plan. *See id.* at 793-94 ("The crucial consideration is what Congress intended.") (internal quotation marks and alteration omitted).

B. The Text Of NCLB Establishes That An Approved Plan Is Simply A Funding Condition

Nothing in the text of NCLB so much as hints at such an intent. The provision on which petitioners rely specifies that a state must submit a plan to the Secretary of Education that "describe[s]" how the State plans to establish standards for raising the level of English language proficiency, to ensure that local educational agencies receiving a subgrant will assess the proficiency of ELL students, and to hold such local educational agencies accountable if ELL students, as a group, fail to make adequate yearly progress in accordance with the state-chosen standards. 20 U.S.C. § 6823(a), (b)(2), (b)(3)(C) and (D), (b)(5). Section 6823 prescribes the submission of a plan addressing those areas as a precondition to Ti-

tle III funding. It nowhere states or implies that submission of a plan could constitute compliance with the EEOA. And the Secretary's approval of a plan simply means that the plan "meets the requirements of *this section*." 20 U.S.C. § 6823(c) (emphasis added). Section 6823(c) does not state or imply that the Secretary's approval of a plan establishes compliance with the EEOA.

In approving a plan, moreover, the Secretary has no occasion to address whether the State is meeting its EEOA obligations. Instead, the Secretary considers whether the State has "describe[d]" how it will address the matters of standards, testing, and accountability. 20 U.S.C. § 6823(b) and (c). In deciding whether to approve a plan, the Secretary thus does not conduct a substantive review of the adequacy of the State's ELL education program, much less determine whether the State is following through with appropriate "practices, resources, and personnel," *Castedana*, 648 F.2d at 989, 1010, necessary "to overcome language barriers that impede equal participation" in instructional programs. 20 U.S.C. § 1703(f). Accordingly, the existence of an approved NCLB plan simply makes a state eligible for NCLB funding; it cannot establish that a state is complying with the EEOA. *See* U.S. Dep't of Justice, Educational Opportunities Section Cases on English Language Learners, *available at* http://www.usdoj.gov/crt/edo/caselist.php (post-NCLB consent agreements requiring specific actions under the EEOA even though state possessed an approved NCLB plan).

Had Congress intended for an approved NCLB plan to establish compliance with the EEOA, it could have easily said so. It could have simply added a provision to 20 U.S.C. § 6823 stating: "the submission of a plan pursuant to this Section that is approved by the Secretary shall fulfill a State's obligations under 20 U.S.C. § 1703(f)." The absence of such a provision cannot be attributed to congressional oversight. NCLB contains a level of detail rare for any federal statute imposing conditions on state and local governments. *See, e.g.*, 20 U.S.C. § 6311. It is highly unlikely that a Congress engaged at that level of detail would have inadvertently failed to note that its funding conditions displaced long-settled standards for EEOA compliance.

Indeed, far from expressing any intent to displace the EEOA's established compliance standards, Congress specified that "[n]othing in this part shall be construed in a manner inconsistent with any federal law guaranteeing a civil right." 20 U.S.C. § 6847. That provision reinforces Congress's intent to refrain from disturbing the established meaning of existing civil rights laws, including the EEOA. Petitioners' effort to replace the established EEOA standard with an approved-NCLB-plan standard conflicts with that intent.

C. Petitioners' Approach Would Replace The EEOA's Mandatory Duty And Private Right Of Action With A Voluntary Condition Enforceable Only By The Secretary

The structural differences between the EEOA and NCLB further undermine petitioners' argument.

The EEOA imposes a mandatory duty on all states to take appropriate action to overcome language barriers of ELL students; it creates an individual private right of action for each ELL student; it requires a court to determine whether the state is taking appropriate action; and it authorizes a court to order a judicial remedy upon finding a violation. *See* 20 U.S.C. §§ 1703(f), 1706, 1712.

By contrast, NCLB imposes duties on a state only if it voluntarily assumes them by accepting Title III funds. The state's voluntarily-assumed duties are owed to the Secretary of Education, not to any individual. And the Secretary, not a court, determines whether the funding conditions have been satisfied, and if not, how to remedy non-compliance. 20 U.S.C. § 6311(e).

Petitioners' theory thus would require concluding that Congress, without saying so expressly, intended for funding conditions that are voluntarily assumed and enforceable only by the Secretary to serve as the full measure of compliance with a distinct statute that creates mandatory duties, individual rights, and judicially enforceable remedies. Petitioners cite no statutory or judicial precedent supporting that counterintuitive result. Any such inference is particularly implausible in light of the nature of NCLB and its funding conditions, and the implications for the EEOA private right of action.

To begin with, Congress in NCLB authorized expenditure of Title III funds only "for each of the 5 succeeding fiscal years." *See, e.g.*, 20 U.S.C. § 6801(a)(1). Continuation of NCLB funding beyond the initial five years therefore requires a new au-

thorization or an appropriation each year. It is unlikely enough that Congress would displace a fixed mandatory duty with conditions arising only if a state voluntarily accepts federal funds. But it is all the more unlikely that Congress would do so when the funding statute authorized the expenditure of funds only for a finite period.

Moreover, petitioners' theory has profound implications for the scope of the EEOA private right of action. *Every* state possesses an NCLB plan approved by the Secretary of Education. *See* p. 3, *supra*. Petitioners' theory therefore would entirely displace the private right of action expressly provided by Congress against the state, and would eliminate the role expressly given by Congress to courts to assess a state's fulfillment of its obligation to take appropriate action. That would remain true even if a state failed to follow through with any of the practices, resources, or personnel necessary to overcome language barriers, and even if school districts systematically failed to meet NCLB's adequate yearly progress objectives for ELL students. As long as a state possessed a testing and accountability plan approved by the Secretary, ELL students would relinquish their right to appropriate action from the state, and a court would relinquish its power to afford redress. Petitioners offer no persuasive evidence that Congress intended that highly improbable result.[12]

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[12] Petitioners' approach would also give rise to innumerable line-drawing problems lacking any grounding in the statutory text. Petitioners argue that their theory would leave room for an individual to bring a challenge to a particular school's treatment of him as an "individual abuse." Superintendent's Br. 59;

D. The Differences In The Scope Of The Two Statutes Confirm That NCLB Does Not Displace The EEOA

This Court has established that, when the scope of a later-enacted statute is "narrower" than a pre-existing statute "in some respects" and "broader in others," the most natural inference is that Congress intended the more recent statute to supplement, rather than displace, the earlier statute. *Fitzgerald*, 129 S. Ct. at 796. That principle fully applies here.

In significant respects, NCLB is narrower in scope than the EEOA. First, NCLB focuses primarily on outputs in the form of testing results. *See* Legislators' Br. 13, 62-63. It does not address the appropriate inputs necessary to overcome language barriers and ensure equal participation by ELL students, such as qualified teachers, appropriate class sizes, and suitable instructional materials. The EEOA, by contrast, requires implementation of such inputs. *See* Superintendent's Br. 38.

Second, NCLB is narrower than the EEOA in the academic subjects it addresses. NCLB requires testing students only in math, English, and science. 20

Legislators' Br. 60. But that category lacks any textual basis and is by no means self-defining. The private right of action in any event includes challenges to systemic failures as well as "individual abuses." *See* 20 U.S.C. §§ 1703(f), 1720(a) (defining educational agencies required to take appropriate action as encompassing both state and local educational agencies). And most violations of the EEOA derive in some measure from broader, systemic failures. Petitioners' approach would eliminate that crucial component of the private right of action without any evidence that Congress desired that result.

U.S.C. § 6311(b)(1)(C). The EEOA, by contrast, requires equal participation in the full range of academic subjects, *see id.* § 1703(f), including, for instance, foreign languages, civics and government, economics, arts, history, and geography.

Third, NCLB aims to ensure that ELL students satisfy a minimum proficiency standard set by the State itself. It does not condition funding on the establishment of plans to ensure that ELL students have equal access to the full spectrum of instructional programs, including advanced placement classes or gifted programs. The EEOA, by contrast, requires appropriate action to afford equal access to all instructional programs. *See* 20 U.S.C. § 1703(f).

Fourth, NCLB's testing requirements for ELL students are confined in reach in some respects. For example, NCLB requires no subgroup testing in schools with fewer than 40 ELL students. 20 U.S.C. § 6311(b)(2)(C)(v)(II)(dd). States also need not test recently arrived students. 34 C.F.R. § 200.6(b)(4). And federal guidance allows States to include former ELL students in the ELL subgroup for two years after those students gain proficiency. *Id.* § 200.20(f)(2). The EEOA, by contrast, requires appropriate actions for all ELL students, not only those who attend school with at least 39 other ELL students. The EEOA requires appropriate actions for recently arrived students as well as students who arrived more than a year beforehand. And the EEOA does not automatically accept, as the full measure of appropriate action, yearly progress measures potentially affected by the inclusion of students already proficient in English.

While NCLB is "narrower" than the EEOA in those respects, it is "broader in others." *Fitzgerald*, 129 S. Ct. at 796. First, with respect to student testing, NCLB establishes conditions at a level of detail far exceeding anything required by the EEOA. Among other requirements, NCLB specifies in detail who must be tested, how often, and on what subjects; who must be consulted in developing annual measurable objectives; how the testing data must be computed and reported; and how much progress must be made each year. 20 U.S.C. § 6311(b). The EEOA "appropriate action" requirement does not establish obligations at that level of detail.

Second, when schools fail to achieve the required adequate yearly progress, NCLB contemplates accountability measures extending beyond any conventional judicial remedy. Such measures include withdrawal of funds, replacement of staff, and turning over of the school's management to a private contractor or the State. 20 U.S.C. §§ 6316(b)(7)(C), 6316(b)(8), 6842(b)(4).

In short, while the two statutes may share overlapping purposes in some measure, they employ markedly distinct means. In such circumstances, the only possible conclusion is that NCLB supplements, rather than displaces, the EEOA's preexisting compliance standards. *Fitzgerald*, 129 S. Ct. at 796. In fact, NCLB expressly provides that funding shall supplement, rather than supplant, the funding for required programs, including programs required by the EEOA. 20 U.S.C. § 6825(g); U.S. Dep't of Education, Supplement Not Supplant Provision of

Title III of the ESEA, *available at* http://www.ed.gov/programs/sfgp/supplefinalattach1.doc.

It is not at all unusual for new statutes to supplement rather than displace preexisting civil rights statutes. "[L]egislative enactments in" the area of civil rights "have long evinced a general intent to accord parallel or overlapping remedies." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974); *see CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951, 1960 (2008) (describing series of decisions holding that the "overlap" between earlier and later civil rights statutes "reflects congressional design"); *Fitzgerald*, 129 S. Ct. at 796-97 (Title IX and § 1983); *Wright v. Roanoke Redev. & Housing Auth.*, 479 U.S. 418, 429 (1987) (Housing Act and § 1983); *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 461 (1975) (Title VII and § 1981); *see also Marek v. Chesny*, 473 U.S. 1, 24-26 (1985) (Brennan, J., dissenting) (Title VII and Equal Pay Act); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 416-17 & n.20 (1968) (Fair Housing Act and § 1982); *Barnes v. Gorman*, 536 U.S. 181, 184-85 (2002) (ADA and Section 504 of the Rehabilitation Act).

Those examples involve situations in which Congress added a new private remedy. But given Congress's general desire to preserve private civil rights remedies, Congress would be even less likely to intend that a funding condition enforceable only by the

federal government displace a preexisting and express private remedy.[13]

Petitioners contend that interpreting NCLB plan approval as the measure of EEOA compliance is necessary to avoid a conflict between the statutes. Legislators' Br. 53; Superintendent's Br. 54, 58. There is no conflict. A state can carry out NCLB's testing and accountability measures and also follow through with practices, resources, and personnel required by the EEOA to overcome language barriers. Petitioners fail to explain how fulfilling both obligations would create any conflict. And the possibility of a conflict seems particularly remote because a state is always free to modify its NCLB plan. *See* 20 U.S.C. § 6823(d)(1)(B). In any event, whatever the potential for conflict in theory, nothing in Arizona's approved plan precludes complying with the district court's order to identify the elements of an appropriate ELL program and ensure funding rationally related to program costs. *See* Arizona Consolidated State Application Accountability Workbook at 44 (July 3,

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[13] Of the cases petitioners cite, only *United States v. Fausto*, 484 U.S. 439 (1988), interprets a subsequent statute to displace a pre-existing private right of action. In that case, the Court held that the Civil Service Reform Act (CSRA) displaced a judicially-recognized action under the Back Pay Act. But that was because the CSRA aimed to replace a patchwork of preexisting remedies with a new comprehensive remedy, and it would have undermined that purpose to allow an action expressly disallowed under the CSRA to proceed under the Back Pay Act. *Id.* at 443-44, 448-49. That is far removed from the situation here.

2008), *available at* http://www.ed.gov/admins/lead/account/stateplans03/azcsa.pdf.

Finally, petitioners argue that an EEOA remedy is never "essential" when a state has an approved NCLB plan. Legislators' Br. 56. But that is simply a repackaging of their primary argument that an approved NCLB plan automatically satisfies the EEOA obligation to take appropriate action. An approved NCLB plan affords no automatic guarantee that a state is actually following through with the practices, resources, and personnel necessary to overcome language barriers that impede equal access to instructional programs. And when a state fails to take such actions, a judicial remedy is "essential," regardless of whether the state may have an approved NCLB plan.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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